No. 12,589

IN THE

United States Court of Appeals

For the Ninth Circuit

L. D. ROACH, as guardian of Arno Liebscher, an insane person,
Appellant,

vs.

MATANUSKA VALLEY FARMER'S COOPERATING ASSOCIATION, a corporation,
Appellee.

Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF OF APPELLEE.

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I.

STATEMENT RELATING TO PLEADINGS AND JURISDICTION.

This is an appeal taken by appellant (plaintiff in the lower Court) from a final decree rendered on the 3rd day of March, 1950, by the District Court for the Territory of Alaska, Third Division, in favor of the appellant, L. D. Roach, and against the appellee, Matanuska Valley Farmer's Cooperating Association (R 111-115).

The District Court for the Territory of Alaska is a Court of general jurisdiction and consists of four divisions, of which the Third Division is one. Jurisdiction of the District Court is conferred by Title 48 U.S.C. Sec. 101. See also Alaska Compiled Laws Annotated, 1949 (53-1-1). Jurisdiction of this Court to review the decree of the District Court is conferred by New Title 28 U.S.C., Sections 1291 and 1294.

Appellant in this action as plaintiff below, commenced this action on December 23rd of 1948. The amended complaint consists of two causes of action which I believe can be fairly summarized as claiming the right in appellant to the possession of the property in question under three distinct theories as follows:

First: That the lease made on February 27, 1941, by James R. Campbell as guardian of Arno Liebscher, an incompetent person, to and in favor of Matanuska Valley Farmer's Cooperating Association, the appellee, is absolutely void because, as it is claimed, there is no statutory authority for the making of such lease or for its approval or confirmation by the Court.

Second: That the lease, while not void, is voidable for two separate reasons as follows: (1) Because of the claimed mental incapacity of Mr. Campbell, the guardian, to make the lease in question, and because the appellee allegedly overreached and overpersuaded such guardian in securing the lease, and that the lease was unconscionable, inequitable, and confiscatorial. (2) Along with the last-mentioned proposition is an apparent claim that the lease, even

though satisfactory at first, is voidable now because of change in conditions in that property taxes have risen steadily while cash income has remained constant, and under the terms of the lease will remain constant during such term. Appellant has claimed that plaintiff cannot pay the taxes and that defendant, by building extra buildings, has caused a great increase in taxes, and is deliberately trying to cause the property to be sold for taxes so it can purchase the property at a cheap price. It is further claimed that unless the lease is cancelled, plaintiff will eventually lose the property at tax sale to the damage of his ward, and that plaintiff has no redress except to void the lease if the property is to be saved.

Third: Appellant apparently admits the validity of the lease but claims that appellee has breached the lease and that appellant is entitled to possession of the property by reason of such breach as follows:

1. That appellee breached the lease by constructing a second building on the property, thus raising the taxes beyond the power of appellant to pay.

2. That appellee should have paid the taxes on the buildings it constructed.

3. That appellee failed to carry insurance as provided by the lease.

4. That appellee failed to pay the cash rent of $45, due December 10, 1948, when due.

In answer to plaintiff's amended complaint, defendant admitted that plaintiff was guardian of Arno Liebscher, an incompetent person, maintaining the

action for and on behalf of the incompetent person, and admitted the corporate existence of the defendant. The defendant admitted that the incompetent was the owner of the property in question, and the execution of the lease, and that it was in possession of the property, and denied that such possession was forcible or unjust. Defendant admitted that by the terms of the lease it was granted permission to demolish the buildings on the property and to salvage such of the materials of such buildings as were usable, and specifically denied all the allegations contained in the first cause of action of plaintiff's amended complaint to the effect that the lease was unconscionable, inequitable, etc., or that the defendant over-reached the plaintiff, or that the buildings previously on the property, if kept in a fair state of repair, would have rented for the sum of $6,000. Defendant specifically denied that the guardian acted in excess of and beyond his powers and that the Probate Court had no power to authorize or approve the lease in question. Defendant admitted that the cash income under the terms of the lease amounted to $540 per year and that certain taxes were unpaid by the plaintiff and had become delinquent, and that the property had been advertised for sale, and alleged that defendant had paid taxes for the year 1948 under date of April 4, 1949, and that such payment, including penalty, interest, and costs, amounted to $965.73, and specifically alleged that there were no city assessments for sidewalk and street improvements and repairs charged against the property.

In answer to the second cause of action to plaintiff's amended complaint, defendant denied specifically that it had breached the lease in question and specifically alleged that it had paid its personal property tax for the year 1948 as well as for all other years since the execution of the lease, and alleged that it had expended in excess of $38,000 in buildings and improvements upon the real property in question, all of such improvements to revert to the lessor in accordance with the terms of the lease. Defendant admitted that it was late in making its payment due December 10, 1948, and it alleged that such failure was due to an oversight of one of defendant's employees. Defendant further alleged that on or about December 27, 1948, it tendered its check to plaintiff for such rent and that that check, together with a check for the January, 1949, rent was refused by the plaintiff and returned by the plaintiff. The answer further alleged that all rental payments not accepted had been tendered to the plaintiff and refused, and that such rental payments have been deposited with the Court, together with interest and costs when ascertained, and that it had been ready, willing, and able at all times to pay the monthly rents provided for in the lease, but that in view of plaintiff's attitude, it would be useless to continue sending monthly payments to the plaintiff. The answer states that on several occasions since the date of the lease the defendant had made rental payments after the due date and that such payments had been accepted by the plaintiff, and alleged that by his course of conduct

the plaintiff had waived strict performance of the lease insofar as rental payments were concerned. Defendant further alleged that it was under no duty, by the terms of the lease or otherwise, to pay taxes on the property, and denied that plaintiff was entitled to damages against the defendant or to costs and attorney's fees.

As an affirmative defense, defendant alleged the facts concerning the adjudication of Arno Liebscher as an insane person and the appointment of James R. Campbell as guardian for such insane person. Defendant then alleged the value of the property at the time the guardian was appointed and the condition of the property in 1940, that the premises were often vacant between the time of the appointment of Campbell as guardian and the execution of the first lease to defendant in December of 1940, and alleged the execution of such lease and the subsequent execution of the lease which is the basis of this action, and summarized the provisions of the second lease, and stated that the second lease was expressly approved by the Probate Court. The answer further alleged that in accordance with the terms of the lease defendant had expended in excess of $38,000 in capital improvements upon the property. The affirmative defense of the answer alleged that the plaintiff, L. D. Roach, acted as attorney for James R. Campbell, the former guardian, and actively participated in negotiations for the two leases made to the defendant by such guardian and prepared the lease which is the basis of this suit, together with necessary petitions and orders of the Probate Court in connection there-

with, and that L. D. Roach at all times had full and complete knowledge of the negotiations and of the agreement reached and of the leases executed, and that L. D. Roach, the plaintiff, at no time during negotiation of the lease in question claimed that such lease was unconscionable, inequitable, or confiscatorial, or beyond the power of the guardian to make. The answer further alleged that L. D. Roach has acted as guardian of Arno Liebscher, incompetent, since the 25th day of August, 1941, and at all times had full knowledge of the construction carried on by the defendant and made no objection thereto, that the plaintiff, as guardian, had paid all taxes, including the year 1946 without making any claim prior to that date that the defendant should be paying such taxes or any part thereof, and that the first contract between plaintiff and defendant concerning taxes was not to the effect that defendant should have paid the taxes but that by reason of increase in taxes it was difficult for the plaintiff to pay such taxes out of the cash income of the property. Defendant then claimed that plaintiff was estopped to claim that the lease in question was void or voidable and that if in fact any equitable cause of action ever existed in favor of plaintiff and against defendant that such cause of action should be barred by reason of laches of the plaintiff in failing to commence a suit earlier (R 19-34).

The plaintiff, by his reply, in general denied all the affirmative matter contained in defendant's answer, either upon information and belief or specifically. In such reply plaintiff specifically admitted

that he never at any time during negotiation of the lease in question informed defendant's agents that he believed the lease was unconscionable, inequitable, and confiscatorial, and alleged that he was not duty bound to inform the defendant of anything and was not under any obligation to the defendant to so inform its agents and employees. He also specifically admitted the release of Mr. Campbell, the former guardian, and the appointment of plaintiff as guardian, and that he has acted as guardian since August 25, 1941. Plaintiff further admitted that he had paid taxes on the property as long as there were sufficient funds with which to pay the taxes (R 35-40).

II.

STATEMENT OF THE CASE.

Arno Liebscher, also known as Liebschner, was adjudged incompetent by the Probate Court for the Territory of Alaska, Third Division, Anchorage Precinct, on June 28, 1929, and since that date he has been confined to Morningside Hospital for the insane at Portland, Oregon. On January 6, 1930, James R. Campbell was appointed by such Probate Court as guardian of the person and estate of the said incompetent (R 284). The guardian qualified and letters of guardianship were issued to him on April 6, 1930. The property of the estate consisted of Lot Number 9 of Block Number 23 of the Original Townsite of Anchorage, Alaska. The real property was appraised in the guardianship proceeding at $900.00, including

land and buildings, shortly after the guardian qualified. Personal property in the building was appraised at $100 at the same time (R 215 and 215a, Admissions on Pre-Trial Conference).

The guardian attempted to keep the property rented but the buildings were in a bad state of repair and he found it very difficult over the years to secure and retain tenants, and in some cases found it a difficult matter to collect the rentals even when the property was rented (final account of Guardian Campbell, defendant's Exhibit "N"). During the period between April 6, 1930, and August 15, 1941, Mr. Campbell, as guardian, received a total gross rent of $2,199 for the estate property (final account of Guardian Campbell, defendant's Exhibit "N"). This gross rental figure of $2,199 included $450 for nine months' rent at $45 per month, commencing with December, 1940, received from the defendants under the two leases hereinafter mentioned. Thus the guardian received the sum of $1,794 as gross rentals for the property for the period April, 1930, through November, 1940, a period of one hundred twenty-eight months, or an average of $14 per month.

In December of 1940, immediately prior to the first lease to the defendant, the property was rented by Campbell to one "Louie" at a rental of $10 per month (R 389).

Between the time Campbell qualified as guardian, in April of 1930, and the time of the first lease to defendant, in December of 1940, the personal property originally appraised at $100, belonging to the estate,

had become worn out and valueless (Petition dated December 4, 1940, made for Campbell by plaintiff, defendant's Exhibit "F"). During the same period the buildings then on the property "had depreciated greatly and were in need of extensive and expensive repairs" (defendant's Exhibit "F"), and were in a dilapidated and unsafe condition (finding contained in order of Probate Court dated February 24, 1941, approving second lease, defendant's Exhibit "J").

The property, including land and buildings, was assessed by the City of Anchorage for the year 1941 as of September 30, 1940, at a value of $1,500 (plaintiff's Exhibit 1).

Late in the year 1940 defendant association purchased a dairy business and desired to secure business quarters in Anchorage. Mr. Stock, defendant's manager, and other officials of defendant, made inquiries around Anchorage to locate a suitable location. They inspected two or three premises which would have been suitable and which could have been secured on long-term leases (R. 358, 476). Then Mr. Stock learned that Mr. Campbell controlled some property which might be suitable for defendant's purpose and contacted Mr. Campbell. Mr. Stock discussed his plans with Mr. Campbell and learned that Campbell would be interested in leasing the property and went and looked the property over (R 359). He contacted Mr. Campbell again, and discussed defendant's plans concerning the property and the terms of a possible lease of the premises with him. Mr. Stock offered $30 a month rent and Campbell didn't think that was

enough. Judge Price was the United States Commissioner and ex-Officio Probate Judge at that time and Campbell and Judge Price settled on a rental of $45 per month for the property (R 363). Mr. Stock discussed with Mr. Campbell the length of the proposed lease and the right to rebuild the old building or to build a new building and came to an agreement as to a lease. Stock had several conversations with Campbell about the proposed lease and at the request of Mr. Campbell he discussed the matter with Judge Price several times. Campbell also discussed the matter with Judge Price. Mr. Campbell at all times seemed to know what he was doing (R 364-365). As a result of the various discussions, a rough draft lease was drawn on behalf of defendant and that was discussed by Campbell and Judge Price and Stock as a basis of what should go into the final draft (R 364, 380).

Meanwhile, Mr. Campbell contacted Mr. Roach some considerable time prior to December 2, 1940, and discussed the matter with him (R 491) and told him he wished to lease the estate property to defendant (R 290).

Under date of December 2, 1940, Mr. Roach wrote Mr. Rasmussen, secretary of defendant, to the effect that Campbell had instructed him to proceed with the lease but that he had not located the Court file and that the matter was being held up while search was being made (plaintiff's Exhibit 14, R 494).

Subsequently, Mr. Roach located the Court file on the guardianship in Mr. Cuddy's office, along with

personal files left by Mr. Morton who had formerly been acting as attorney for Mr. Campbell in the matter (R 290, 492, 493).

Somewhere in the course of the negotiations, Mr. Campbell gave the rough-draft lease above mentioned to Mr. Roach with directions to Mr. Roach to follow it in drawing a lease between Campbell, as guardian, and the defendant association (R 292). The rough-draft lease herein mentioned is plaintiff's Exhibit 12. Expiration date of the rough-draft lease had been changed in pencil from December 1, 1955, to December 1, 1950, and that change probably was made at the direction of Mr. Campbell, the guardian (R 495). Mr. Roach then proceeded to prepare the final draft of the first lease (R 294, 327, 328).

After completion of the final draft of the lease, officials of defendant corporation made an appointment to meet with Mr. Campbell. On December 6, 1940, Mr. Stock, manager, Mr. Brix, president, and Mr. Rasmussen, secretary of defendant association, drove from Palmer to Anchorage, arriving in Archorage early in the forenoon (R 367, 478). Mr. Stock and Mr. Rasmussen testified they picked up Tom Donohoe, association attorney, and the four went to Campbell's house (R 396, 478). Roach wasn't there (R 367, 478) and Campbell insisted that nothing be done until Roach came (R 367). Stock and Rasmussen went and got Mr. Roach (R 367, 395, 479). Campbell read the lease and went over it with them and they all signed it (defendant's Exhibit "H", R 366, 367, 479-481). This lease, in brief, leased Lot 9 of

Block 23, Original Townsite of Anchorage, Alaska, to defendant for a term of ten years and one month at a monthly rental of $45 per month, payable in advance on the tenth day of each month, required defendant to make all necessary repairs at its own expense, and authorized but did not require the defendant to make any alteration it saw fit and to erect an entire new building or buildings. Mr. Campbell knew what was going on and appeared to understand what was said about the lease (R 365, 480). Mr. Roach and Anna Campbell, the wife of James R. Campbell, witnessed the lease and Mr. Roach took the acknowledgements of Mr. Campbell, as Lessor, and of Mr. Brix and Mr. Rasmussen on behalf of defendant (R 379). This lease was dated December 6, 1940, and is defendant's Exhibit "H". Neither Campbell nor Roach nor any of those present suggested any dissatisfaction with the lease as drawn (R 481).

Mr. Roach denies that Tom Donohoe was present when the lease was signed but it is admitted all around that Mrs. Campbell, Mr. Roach, Mr. Brix, Mr. Rasmussen, and Mr. Stock were present at that time in addition to Mr. Campbell (R 333, 365).

Prior to the signing of the first lease, as above set out, Mr. Roach prepared a petition to the Probate Court on behalf of Mr. Campbell for order to lease, and presented with such petition a copy of the proposed lease (defendant's Exhibit "F", R 328). Under date of December 5, 1940, the Probate Court specifically found that it was for the advantage and the best interest of the estate to enter into the lease,

and specifically authorized the guardian to execute a lease of the estate premises substantially in the form of the lease presented (defendant's Exhibit "G").

Defendant-appellee took possession of the estate property as soon as satisfactory arrangements could be made with "Louie", the person then in possession, and has remained in possession to the present time (R 381, admissions as to possession in answer).

The building on the property when defendant took possession of it in December of 1940 or January of 1941 consisted of two prefabricated buildings side by side, surrounded by a wall consisting of rough lumber standing on end (R 220, 221, 222, 359, 361, 401, 403). The entire affair was roughly fifty feet wide by forty or forty-five feet in depth (R 220, 360, 390), and covered by a shed type roof, also constructed of rough lumber (R 221, 222, 361, 403). It had no central heating (R 360, 403). It had no plumbing (R 360, 403). Such electric wiring as there was in the building consisted of wires strung here and there on the ceiling with drop cords for lighting fixtures (R 403-404). It had no foundation but was set on blocks. The floor joists had rotted away at the ends and the floor was humped up in the middle and sagged down at each side (R 402). The building was in such a bad state of repair that the City of Anchorage would not grant a permit to rehabilitate it (R 360).

Defendant set about ways and means of tearing down the old building and constructing a new one.

The ten years remaining of the original lease dated December 6, 1940, would not justify the expenditure necessary to construct the new building necessary and so Mr. Stock contacted Mr. Campbell regarding a new lease which would be generally the same as the old one except for a term of fifteen years instead of ten, and except that defendant would bind itself to build a new building which would revert to the estate (R 368, 369, 481, 482). Discussions as to the new lease were also had between Mr. Stock and Judge Price and an agreement was reached as to a new lease (R 369, 370). Mr. Roach was again called in by Mr. Campbell on February 12, 1941, and instructed to prepare a new lease, which he did (R 296, 297). Mr. Stock and Mr. Roach discussed the new lease with Judge Price (R 370, 496). Roach for Campbell prepared and on February 24, 1941, presented a petition to the Probate Court requesting authority to execute the new lease extending the term "in consideration of the new building to replace the present ones which are in a dilapidated condition" (defendant's Exhibit "I"), and presented certain evidence to the Court in support of the petition. Mr. Roach drew and on February 24, 1941, had the Court sign an order authorizing new leases (R 496, defendant's Exhibit "J"). The Court found that the buildings then on the property were in a dilapidated and unsafe condition and that it was "to the advantage of and in the best interests of the estate to grant an extended term in consideration of the expensive improvements to be made that will eventually revert to the estate," and

authorized a lease for fifteen years from the date of the lease. Such lease was to provide for a rental of $45 per month and was to be substantially in the same form as the lease previously executed between the same parties, but was to bind the lessee to commence and to complete upon the leased premises a building to cost not less than $15,000, and to provide that the building would revert to the estate (defendant's Exhibit "J").

Mr. Roach testified that on February 25, 1941, he discussed the proposed lease with Campbell and suggested that the lease should provide that the lessee would pay the taxes and objected to other things in the proposed lease, and that Campbell became angry with him and said, "Some years I paid them myself", referring to the taxes (R 297, 496). The next day Roach took the proposed lease to Judge Price to be approved and made a date to have it signed the following day (R 496). The parties got together at Campbell's house on February 27. Present at that time were Mrs. Campbell, Mr. Roach, Mr. Brix, Mr. Stock, and Mr. Rasmussen, in addition to Mr. Campbell (R 370, 483). Campbell read the lease to satisfy himself of its contents. The details had all previously been worked out in conference between the parties and their attorneys and the probate judge (R 371). The parties all went over the proposed lease and signed it (R 371, 483). No dissatisfaction with the lease was expressed by anyone present (R 484). Mr. Campbell took part in the discussion, appeared to understand the conversations, and appeared to know what was going on (R 372, 484), and was thoroughly

familiar with the terms of the lease (R 372). At the time he signed the first lease, he seemed quite pleased, because he was not getting much money out of the tenant then in the property and wanted to get a good lease where he could get the money and be sure of it, and the witness Stock couldn't see any difference in him when the second lease was signed (R 372).

The second lease above mentioned was dated February 27, 1941, and is in evidence as defendant's Exhibit "K". Signatures of Campbell as lessor, and of Brix and Rasmussen for the lessee, were likewise witnessed by Mrs. Campbell and Mr. Roach, and acknowledgments of both parties were taken by Mr. Roach (See original lease, defendant's Exhibit "K"). That lease is the lease in dispute in this lawsuit.

On the same day, February 27, 1941, Mr. Roach presented a copy of the new lease to the Probate Court for its approval and the lease as signed was on that day specifically approved by the Court (defendant's Exhibit "M").

Defendant took bids for the demolishing of the building on the property preparatory to constructing the new building. Three bids were received—one to demolish the old building for the material in it, one for about $30 to $35, and one for about $156 (R 369). The latter bid was made by Mr. Swoboda, also listed in the records as "Sabotta." His bid was high and he did the work. He testified at the trial (R 222, 401). Part of the old building on the property was moved to the rear of the lot and the walls were laminated to meet city requirements, and it was used

as a boiler room for the new building and for storage. It was constructed or altered at the same time as the new building (R 373). This building is shown on the assessor's plat as Building 2, appraised at $2,272 (defendant's Exhibit "U"). It is apparently the building called "another, second, and additional building" in plaintiff's complaint. It was further improved by turning it into a cold storage room in 1947 and 1948, as will be set out in the next paragraph.

Under the terms of the second lease above described, defendant, prior to the month of June, 1942, expended something over $30,000 in constructing a new building on the premises. In 1945 defendant added a cinder block boiler room to the main building at a cost of some $2,300. Between April, 1947, and January, 1948, defendant expended nearly $6,000 in converting part of the former boiler room into a cold storage room. Total investment of defendant in buildings on the property stood at $38,621.08 at the time of trial (R 461, defendant's Exhibit "X").

Mr. Campbell continued to act as guardian of the estate of Arno Liebscher until August 25th of 1941. On that date he filed his final account with the Court, and at his own request was discharged as guardian as of that date. L. D. Roach, the plaintiff in this action has been an attorney at law, duly admitted to practice in Alaska, and has been practicing his profession at Anchorage since 1924 (R 286) and acted as attorney for such guardian in preparation and presentation of his final account, and of the order approving such account and discharging the guardian (See defendant's Exhibits "N" and "O", R 298, 328, 329).

At the same time Mr. Campbell filed his final account, Mr. Roach, the appellant, was appointed guardian in his stead (defendant's Exhibit "P", R 298, 328, 329) and took office right away (R 298) and has acted as guardian of Mr. Liebscher since August 25, 1941 (R 298).

All rentals under the terms of the lease were from the beginning paid by check sent through the mail by defendant (R 271). From the beginning, first to Mr. Campbell and later to Mr. Roach, some of the rental payments were made late. Some of them were made early. Defendant's Exhibit "V" lists various checks paid by defendant and accepted by the guardian after the tenth of the month. These checks include the checks made February 17, 1941, October 13, 1941, October 13, 1942, December 11, 1942, December 11, 1944, and September 11, 1945. Defendant's Exhibit "S" lists all checks from December, 1945, to and including the ones for December, 1948, and January, 1949. The latter two checks were not accepted by the guardian. The exhibit shows the number of the check, the date of the check, the month for which it was paid, and the date it was banked. The check for December of 1945 was dated December 28, 1945, the check for January of 1947 was dated January 14, 1947, and the check for December of 1948 was dated December 27, 1948. All the checks from December, 1945, through June of 1947 were held and banked together on June 18, 1947. Checks since that time generally were banked every two months, two together, but the checks for February, March, April, and May of 1948 were held until

June 13, 1948, and banked with the June check on that date. Checks for August, September, October, and November of 1948 were banked together on November 24, 1948.

Rental payment for December, 1948, was offered by check drawn by defendant dated December 27, 1948. The check was refused and was returned by plaintiff, together with another check dated January 3, 1949, tendered for the January rent (defendant's Exhibit "D").

Rent for December, 1948, and for January, 1949, together with rent for subsequent months, and together with $174 as an estimated sum to cover interest, costs, and attorney's fees were paid into court as a tender, beginning with a check in the sum of $309 dated February 1, 1949. To the date of the trial, such tender amounted to $714 (defendant's Exhibit "E", defendant's answer Par. IX, R 26).

Plaintiff paid all taxes levied against the leased property until 1948 but failed to pay taxes for 1948 or 1949. Defendant paid all 1948 taxes (R 211) on April 4, 1949, to prevent sale of the property. This payment amounted to $965.73, including penalty, interest, and costs (see plaintiff's Exhibit 1 and defendant's Exhibits "A" and "B"). Taxes for 1949 had not been paid by anyone to the date of the trial (R 211), and including penalty, interest, and costs, amounted to $943.60 to the date of the trial (see plaintiff's Exhibit 1).

In the fall of 1946, for the tax year 1947, the assessor's office for the City of Anchorage for the first

time separated value of the land itself from the value of the buildings. This procedure was general throughout the city (R 185). As it affected the property here in question, that procedure valued the land as distinguished from the buildings at the sum of $18,000 and valued the buildings on a cubic foot basis. As a result of that valuation, the value of the two buildings was set at $16,230 as of the date of the assessment. The sum of $1116 was allowed for depreciation, leaving a net value of the two buildings for the year 1946 in the sum of $15,114. In figuring the tax for that year, levy was made on ninety per cent of the value above set forth, plus ninety per cent of the land, or a total of $29,803. The tax was figured on $29,803 at 15 mills, making a total tax of $447.05 (R 169-171, 185, 186, defendant's Exhibit "U", plaintiff's Exhibit 1). For the year 1948 the same basic method was used in computing the assessment except that the council, by resolution that year, raised the assessed valuation of all buildings in the city by 25 per cent over the base value for the year 1947, leaving the value of the land the same as for the previous year. Insofar as the property here in question is concerned, this procedure raised the assessed value of the buildings to $18,892, and taking it at the nearest $25, resulted in an assessment on the buildings alone of $18,900, or with the lot made a total assessed valuation of $36,900. The tax was figured at 20 mills, making a total tax of $738. The same procedure was used for the assessment for the year 1949 (R 187, defendant's exhibit "U", plaintiff's Exhibit 1).

Under date of June 3, 1942, the Probate Court at Anchorage, in approving the first account of the plaintiff, Mr. Roach, as guardian, among other things ordered that the guardian pay to his ward for his personal use the sum of $5.00 per month and such further small amounts at Christmas and holidays as he might desire (plaintiff's Exhibit 2).

Under date of July 8, 1946, the Secretary of the Interior of the United States of America, under the provisions of a law approved October 14, 1942, made an administrative finding to the effect that L. D. Roach, as guardian, was able to pay toward the support and maintenance of Arno Liebscher for the years prior to that date a sum amounting to $600, and that for the care and treatment of Arno Liebscher, commencing with June 1, 1946, the guardian was able to and should pay to the United States of America the sum of $25 per month (plaintiff's Exhibit 11). Plaintiff paid the sum of $900 under the terms of such order (Eighth account of guardian, defendant's Exhibit "R") and that paid the account through the month of May, 1947. Nothing has been paid by the guardian on that account since the one payment of $900, and the sum of $25 per month is owed to the Government since June 1, 1947 (R 318, 319).

The guardian, J. R. Campbell, in the year 1941 executed and delivered two warranty deeds. One of such deeds conveyed certain real property in the Anchorage Recording Precinct to the United States of America. The deed is dated May 15, 1941, and the signature of the grantor is witnessed by L. D. Roach, the

plaintiff in this action, and another party, and is acknowledged by L. D. Roach. Consideration on that deed is stated to be $5,000 and the deed is recorded in Book 18 of the Precinct Records, Anchorage Recording Precinct, at page 207 thereof (R 330, defendant's Exhibit "W").

The second of such deeds was executed by James R. Campbell and Anna Campbell as grantors to one Florence Hoffman and is dated August 28, 1941. The signatures on that deed also are witnessed by L. D. Roach and another party and the acknowledgment was made before L. D. Roach. That deed conveys certain property in the City of Anchorage, Alaska, and is recorded in Book 34 of the city records of the Anchorage Recording Precinct at page 99 thereof (defendant's Exhibit "W").

Under date of July 12, 1943, James R. Campbell, as grantor, conveyed certain property situated in the City of Anchorage, Alaska, to Anna K. Campbell, the grantee. This deed was executed in the State of California and acknowledged before a Notary Public for the State of California and is recorded in Book 38 of the city records of Anchorage Recording Precinct at page 316 thereof (R 331, 332, defendant's Exhibit "W").

Plaintiff introduced certain evidence through a witness by the name of Backman concerning the value of the property at the time of the trial, and this witness testified that the replacement value of the building constructed by defendant, as distinguished from the land, at that time was about $60,000, and that the

lot, as distinguished from the buildings, at that time was worth about $20,000 (R 233, 234). The same witness testified that 15 per cent of the valuation was a common rental basis in the City of Anchorage (R. 232).

Appellant since the year 1945 has periodically been claiming that the money coming in from the lease was not sufficient to meet the obligations of the estate, and so far as the record shows, late in 1946 first claimed that Mr. Campbell, the former guardian, was incompetent at the time of making the lease. Thereafter, negotiations were had between the parties and certain correspondence passed between the parties concerning the possibility of the defendant securing a new lease for a longer term in exchange for paying the taxes, and concerning the possibility of the defendant buying the property. The various letters are in evidence as plaintiff's Exhibits 3 and 4, and the five letters which constitute defendant's Exhibit "T". This correspondence will show the thinking of the parties at the time the controversy arose and in attempting to work out the controversy. Also, defendant's Exhibits "A" and "B" respectively have to do with the payment of the taxes by the defendant for the year 1948 on April 4, 1949, for the purpose of protecting its interest in the property.

This action was tried November 28, 29, 30, and December 1, 1949.

Written opinion of the court was filed December 30, 1949, and is found beginning at page 64 of the transcript.

By such opinion, the court in general rejected the various claims made by appellant, but found that proper interpretation of the subject lease would be that the building constructed by appellee belonged to appellee until the end of the leasehold term and would require appellee to pay the taxes attributable to the buildings constructed by it, while appellant should pay taxes levied against the land as distinguished from the buildings, and that appellee should repay to appellant taxes previously paid by appellant as to the buildings, and that appellee should receive credit for taxes levied on the land, as distinguished from the buildings, for the year 1948 paid by appellee. The opinion also found that appellant should be entitled to costs.

Since no evidence had been offered as to any breakdown between value of buildings as distinguished from land in tax assessments for the years 1941 through 1946, the court, by its opinion, left that question open (R 81). Subsequent to January 12, 1950, appellant filed his Exhibit 15, being a breakdown of valuations and taxes for such years, made on January 12, 1950, by Merrill G. Chitty, City Tax Assessor. Such breakdown was adopted by the court in its Finding of Fact number XVIII (R 104) and in Paragraph (1) of its decree (R 112).

Appellant prepared proposed findings of fact and conclusions of law and decree for the court's signature. These documents generally, but not entirely, followed the court's opinion. The court did not sign such proposed findings, conclusions, and decree, and

appellant took a general exception to such refusal (R 91, 93).

Appellee prepared proposed findings of fact, conclusions of law, and decree, and the same were signed by the court on March 3, 1950. The findings begin at page 94 of the record, the conclusions of law at page 105 of the record, and the decree at page 111 thereof.

The court on March 3, 1950, allowed both parties one week to submit exceptions to the findings of fact and conclusions of law and decree as signed (R 82).

Appellant took no exceptions to the findings of fact, conclusions of law, or decree as signed, or to any part or parts thereof.

Appellee took various exceptions to the findings of fact and conclusions of law and decree as signed (R 116).

IV.

ARGUMENT.

Appellant in this cause has filed no specification of errors. He is prosecuting the appeal on the basis of his statement of points found beginning at page 127 of the record.

These statements are 21 in number. The first 5 are general in nature and in brief claim that the court erred in failing to sign the findings of fact, conclusions of law and decree proposed by the defendant on the ground that such findings of fact, conclusions of

law, and decree "are not supported by sufficient evidence and are contrary to the evidence and in some instances are not supported by any evidence, and that the court erred in applying the law as set forth in its opinion." So far as these particular statements are concerned, no error is alleged as to any particular findings of fact, conclusions of law, or any particular portion of the decree. Neither is any particular portion of the court's opinion attacked as not being in accordance with the law.

Plaintiff in his brief has consolidated Statement of Points Nos. 1 to 5 inclusive for argument.

Statement of Points Nos. 6, 7, and 8 are to the effect that the court erred as follows:

(6) In not holding the lease in question to be unenforceable and void.

(7) In its construction of jurisdiction of the Probate Court in Alaska.

(8) In construing the powers of a guardian of an insane person.

These three points are consolidated for argument in plaintiff's brief.

Statement of Point No. 9 alleges that the court erred in not holding that the property of the ward was *in custodia legis.*

Statement of Point No. 10 is to the effect that the court erred in not holding the contract in question to be unconscionable.

Statement of Point No. 11 is to the effect that the Court erred in not holding that the guardian was an

incompetent person at the time of making the contract.

Statement of Point No. 12 is to the effect that the court erred in not holding that the lessee was bound by the rule of *caveat emptor*.

Statement of Points Nos. 13 and 14 are to the effect that the court erred in admitting and in excluding evidence. These points are not argued at all by the plaintiff in his brief and will not be argued by the defendant. For the purpose of this argument appellee will consider that the statement of points are the specification of errors as required by Rule 20, Court of Appeals, Ninth Circuit, Subsections (d) and (e). Points not argued in the brief are presumed to be abandoned.

McCarthy et al. v. Ruddock (C.C.A. 9), 43 F. (2d) 976;

Forno v. Coyle (C.C.A. 9), 75 F. (2d) 682.

Statement of Point No. 15 alleges that the court erred in not holding the lease forfeited by reason of nonpayment of rent.

Statement of Points Nos. 16, 17, and 21 allege in brief as follows:

(16) The court erred in not holding that the lease was made for a longer period of time than the guardian had the power to make.

(17) That the court erred in not holding that the guardian had no authority to bind the ward's property by the lease in question.

(21) That the court erred in not cancelling the lease and restoring the plaintiff to the property.

Points Nos. 16, 17, and 21 are argued together in plaintiff's brief.

Statement of Points Nos. 18, 19, and 20 are argued together in plaintiff's brief and state in brief that the court erred as follows:

(18) In not holding that the rental and benefits received by the plaintiff, being far in excess of the amount paid, constitute an equity on the part of the plaintiff, and that the inequitable position taken by the defendant was sufficient to cancel the lease.

(19) In not differentiating between a guardian appointed by a Probate Court in Alaska and a trustee.

(20) That the findings of fact, conclusions of law, and decree, as signed by the court fail to grant sufficient relief to the plaintiff.

Under the practice of the District Court for the Territory of Alaska it is common for the successful party in an equity case to prepare proposed findings of fact, conclusions of law, and decree for consideration by the Court. If the unsuccessful party is not satisfied with the findings of fact, conclusions of law, and decree proposed by the successful party, he may propose findings and conclusions and decree on his own behalf and then the ultimate responsibility of the Court is to adopt one set of findings, conclusions, and decree or the other, or to modify the proposed findings, conclusions, and decree to his satisfaction, or to completely rewrite such findings of fact, conclusions of law, and

decree. That practice was followed in this matter and the Court signed the findings of fact, conclusions of law, and decree proposed by the appellee and refused to sign the findings of fact, conclusions of law, and decree proposed by the appellant.

> "Proposed Findings of Fact and Conclusions of Law submitted by counsel are no more than informal suggestions for the assistance of the court, and only those findings made by the court form part of the record on appeal."
>
> "The fact that proposed Findings of Fact adopted by the trial judge have been prepared by the successful counsel does not detract from their legal force. They are entitled to the same respect as if the judge drafted them."
>
> "The general rule is that a Court of Appeals will consider only those Findings of Fact and Conclusions of Law which are signed by the trial judge and filed as part of the record on appeal."
>
> "Thus proposed Findings or counter-findings of either of the parties may not be included properly in the record on appeal. This has been said to differ somewhat from the former practice."
>
> *Barron and Holtzoff, Federal Practice and Procedure,* 1950, Sections 1124 and 1130, Pages 818 and 830, respectively, both commenting upon Rule 52 of the Federal Rules of Civil Procedure.

American Elastics v. U. S. (D.C. N.Y.) 1949, 84 F. Supp. 198;

Simons v. Davidson Brick Co. (C.C.A. 9), 1939, 106 F. (2d) 518;

U. S. v. Forness (C.C.A. 2), 1942, 125 F. (2d) 928 (certiorari denied 62 S. Ct. 1293, 316 U.S. 694, 86 L. Ed. 1764).

Accordingly, appellee believes that the findings of fact, conclusions of law, and decree proposed by appellant and not signed by the Court are not properly part of the record on appeal and are not before the Court and they will not be discussed by appellee.

Under Rule 52 of the Federal Rules of Civil Procedure as amended, the Court, if it desires to do so, may incorporate its findings of fact and conclusions of law in an opinion or memorandum of decision (see Rule 52, Federal Rules of Civil Procedure, Subsection (a)).

> "The amendment does not prohibit the writing of a separate opinion in addition to formal Findings of Fact and Conclusions of Law, if the trial court deems it necessary to do so * * * The trial judge speaks through his findings and judgment. Statements in an opinion which is not regarded or intended as embracing Findings of Fact or Conclusions of Law cannot control, modify, or impeach the findings or decision."
>
> *Barron and Holtzoff, Federal Practice and Procedure,* above cited, Section 1128, p. 827.

General Metals Powder Co. v. S. K. Wellman Co. (C.C.A. 6), 1946, 157 F. (2d) 505.

The opinion of the Court in this case does not purport to include findings of fact and conclusions of law, and accordingly appellee believes that the opinion of the Court is not properly before the Court on

review, and that appellant should not be entitled to object to matters in the opinion except insofar as such matters are included in the findings of fact and conclusions of law as signed.

Findings of fact made by the trial Court will not be set aside on appeal unless clearly erroneous, and in considering such finding due regard will be given by the Appellate Court to the opportunity of the trial Court to judge the credibility of the witnesses.

Federal Rules of Civil Procedure, Rule 52, Subsection (a) as amended.

The unsuccessful party on appeal may raise the question of the sufficiency of the evidence to support the findings "whether or not the party raising the question has made in the District Court an objection to such finding, or has made a motion directed to them, or has made a motion for judgment.

Federal Rules of Civil Procedure, Rule 52, Subsection (b).

"Upon motion of a party made not later than ten (10) days after entry of judgment, the court may amend its Findings *or make additional Findings* and may amend the judgment accordingly." (Emphasis supplied.)

Federal Rules of Civil Procedure, Rule 52, Subsection (b).

"The motion or its equivalent cannot be made in the Appellate Court by a party who failed to make it in the Trial Court."

Barron and Holtzoff, Federal Practice and Procedure, above cited, Section 1129, p. 829.

Kennedy v. U.S. (C.C.A. 9), 1940, 115 F. (2d) 624.

As appears from the record appellant made no motion to the District Court to amend its Findings or to make additional findings. Neither did appellant take any exceptions to any of the findings as made.

We believe that on the record as presented, appellant in this case is limited to the sufficiency of the evidence to support the findings as made by the Court and to the application of the law made by the trial Court from the findings as made, and believe that on the state of the record appellant should not be entitled to claim that other or further findings should have been made by the Trial Court.

Appellant's statement of points Nos. 1 and 2 respectively relate to the alleged insufficiency of the evidence to sustain the findings of fact, conclusions of law, and decree of the trial Court. In his argument, appellant cites considerable law to the effect that under the Federal Rules of Civil Procedure in a case tried to the Court without a jury, the Appellate Court has the right to consider all the evidence to determine as to whether there is sufficient evidence to support the findings of fact and conclusions of law and states that under such rules, particularly Rule 52, that the practice is similar to the practice under the equity rules. That, of course, is true. However, since this is an equity case, it would seem that it was not necessary to cite authorities to that effect. That has apparently been the practice previous to the adoption of the Federal Rules of Civil Procedure insofar as equity cases were concerned.

Appellant then goes ahead in his brief and attempts to show that there was not sufficient evidence to support the findings made by the trial Court. He states that in this case there is little dispute in the facts except as to the condition of Mr. Campbell, the former guardian, and that statement is probably literally true, but the condition of Mr. Campbell is the central point of appellant's alleged equity and there is considerable dispute on that point, and the findings of the Court on such disputed question should not be disturbed by the Appellate Court.

> "On appeal, the appellate court does not retry the case. The findings of fact are presumptively correct and will not be set aside unless clearly against the weight of the evidence or based upon an erroneous view of the law. Consequently, an appellant seeking to overthrow the findings has the burden of presenting a proper record to the Court of Appeals showing that the evidence compelled a finding in his favor."
>
> *Barron and Holtzoff, Federal Practice and Procedure,* cited above, Section 1131, page 831.
>
> *Paramount Pest Control Service v. Brewer* (C.C.A. 9), 177 F. (2d) 564;
> *U. S. v. Foster* (C.C.A. 9), 123 F. (2d) 32;
> *Ruud v. American Packing & Provisions Co.* (C.C.A. 9), 177 F. (2d) 538;
> *Peterson v. Denevan* (C.C.A. 8), 177 F. (2d) 411.

> "Findings of fact are not 'clearly erroneous' unless unsupported by substantial evidence or clearly against the weight of the evidence or induced by an erroneous view of the law. The mere fact that

on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. The appellate court does not consider and weigh the evidence de novo.

"In considering whether trial court's findings are clearly erroneous, appellees must be given the benefit of all favorable inferences which reasonably may be drawn from the evidence."

Barron and Holtzoff, Federal Practice and Procedure, above cited, Sec. 1133, pages 834, 835.

"At a trial without a jury the judge determines the credibility of oral testimony of the witnesses and the weight to be given to it. An appellate court will not set aside findings of the trial court based upon such evidence."

Barron and Holtzoff, Federal Practice and Procedure, above cited, Sec. 1134, page 845.

Gates v. General Casualty Co., (C.C.A. 9), 120 F. (2d) 925.

"If, however, the findings of fact are supported by substantial evidence and not against the clear weight of the evidence the appellate court may not overturn them."

Barron and Holtzoff, Federal Practice and Procedure, above cited, Sec. 1135, page 850.

Omaha Hardwood Lumber Co. v. J. H. Phipps Lumber Co. (C.C.A. 8), 135 F. (2d) 3.

Appellant in his brief claims in arguing his statement of points numbered 1 to 5 that the evidence will

not sustain the findings of fact and conclusions of law in the following respects:

1. That Campbell, the former guardian was incompetent when he executed the lease which is the subject of this action (brief page 48a).

2. That Campbell was over-reached and over-persuaded until he agreed to and did execute such lease which appellant calls "this monstrosity of a lease, which has now become oppressive, unfair, inequitable, and confiscatorial" (brief pages 48a and 49).

3. That the incompetent is helpless and hopeless and plaintiff cannot pay taxes and pay toward the keep of his ward.

4. That nonpayment of rent on time was a means to an end to force a tax sale of the property so that defendant could buy the property far below its value (brief 49, 56).

5. That taxes will confiscate the property if plaintiff is not relieved from "this unconscionable lease."

Appellee will consider these propositions in order.

In support of his first proposition, appellant claims that the undisputed evidence of the nurse (Simonson), Roach, Carlson, and McElligott was that:

(a) Campbell didn't want to be annoyed. So far as the writer can determine, McElligott didn't testify on that point at all. The others did so testify.

(b) That when Campbell sold his house he "*gave away* thousands of dollars worth of paintings, dishes, and personal effects because he didn't want people running in to pack them."

The writer of this brief believes that no one testified on that point except the witness Simonson and that her testimony doesn't support the contention that Campbell gave anything away, not to mention "thousands of dollars of property." The testimony is that Mrs. Campbell was upset because she wanted to take her things and Mr. Campbell refused, but that the things were sold with the house (R 415). "It went as part of the house when it was sold" (R 427).

It seems to appellant that neither of these propositions tend to prove that Mr. Campbell was incompetent. In the first place, many people don't want to be annoyed. That is not a sign of incompetency. In the second place, there is no evidence at all that the price for the house didn't include a fair price for the paintings and dishes and other personal effects. Mrs. Simonson testified that she knew nothing of the business affairs of the Campbell's except that they sold the home (R 431).

Appellant called five witnesses concerning Campbell's mental condition. Dr. Heitmeyer and Mr. McElligott testified by deposition. Mr. Carlson, Mrs. Simonson, and Judge Roach testified at the trial. It is interesting to note that none of these witnesses were present at the time the lease was being negotiated and signed except Mr. Roach. It is even more interesting to note that Mr. Roach offered no testimony as to Mr. Campbell's condition at the time the lease was signed, and none as to such condition about that time except his statement that Campbell said, "Give them anything they want and get them off my neck." That

statement, of course, doesn't compel a finding of incompetency, especially in view of the fact that according to the undisputed evidence the parties had discussed the terms of the lease and come to an agreement as to such terms between themselves and with the probate judge, and that the witness himself had discussed the matter with the probate judge and had secured an order from such judge to lease the property (R 496, defendant's Exhibit "J"). If, in fact, Campbell did use that language it seems entirely logical that he meant that the matter, including taxes, had been fully discussed and agreed upon between the parties and approved by the Court and that he wanted to get the lease signed.

We believe Mr. Roach's actions at the time the leases were signed speak louder than his words at the trial. He drew the two leases and all of the petitions and orders for the Court at Campbell's direction. He presented the matters to the Court. He was present when the leases were signed and he witnessed and acknowledged Campbell's signature to such documents. He made no protest when Campbell signed. Even now he hasn't testified that he believed Campbell was incompetent to sign the leases. At a later date he witnessed and acknowledged two deeds executed by Campbell. It seems clear that, whatever he may believe now, at the time the leases were executed he knew Campbell was competent.

As against plaintiff's evidence as to Campbell's mental condition, two witnesses, who were present when the lease was signed, testified that Campbell

knew exactly what he was doing, read and understood the lease, and understood its terms.

We believe that under the evidence and under the law the findings and conclusions of the trial Court as to Campbell's competency are adequately supported by the evidence.

In support of his second proposition, appellant alleges that Campbell was over-reached and over-persuaded by defendant's agents. There is not a shred of evidence to support that contention. Campbell at all times had the advice of counsel and consulted about the matter with the probate judge. There is no allegation of fraud or of confidential relationship. Appellee believes that the Court was amply justified in its conclusion to the effect that Campbell was not improperly influenced or over-reached by defendant.

In support of his third proposition, appellant claims that the ward is helpless and hopeless and that under the terms of the lease he cannot pay the taxes and support his ward. We believe the trial Court "leaned over backwards" to favor the ward in requiring appellant to pay taxes attributable to the building. Be that as it may, we have taken no appeal from the order. It seems to us that appellant has fixed in his mind so strongly that he wants to void the lease that he hasn't tried to work the matter out. There is available to appellant under Court decree something over three hundred dollars from taxes found to be owed by appellee from 1941 through 1947, after deducting the money appellee paid for appellant on taxes against

the land for 1948. There also was available at the time of the decree the sum of $720 as rent. The latter figure increases at $45 per month. To the present date that sum would be $1170. Thus, at the present time appellant has available about $1500 plus his costs and attorney's fee. This sum would be sufficient to pay appellant's share of the taxes from 1949 through 1952 on the basis of taxes charged for the years 1948, 1949, and 1950, and leave money over. The lease in any event terminates in February of 1956. Rents from February, 1951, through January, 1956, will amount to $2700.

Appellant should have no difficulty paying his share of the taxes through the leasehold term under order made by the District Court. If appellant needs money to support his ward, he can sell the property under statute or take such other steps as may be available. It seems inequitable on the face of it that appellant should ignore the powers given by law to protect the estate of his ward and attempt to gain an advantage of defendant by cancelling its lease after it has furnished the building which was made part of the consideration for the lease.

In answer to plaintiff's fourth contention, we submit that there is no evidence anywhere that defendant was trying to force a sale of the property at tax sale or otherwise. All of the correspondence together shows that defendant would be willing to increase the rent or to pay taxes if a longer lease could be arranged, or would be willing to buy the property if appellant would sell. Appellant flatly refused both

offers and brought this action. When the property came up for tax sale appellee paid all those taxes.

We submit that appellant has completely failed to show that the evidence failed to support the findings, the conclusions, or the decree.

In answering appellant's points Nos. 6, 7, and 8, appellee believes that no substantial error is there alleged. It is admitted that there is no evidence that the December, 1948, and January, 1949, checks were refused as not being lawful tender. Neither is there any evidence to the contrary. The point, which apparently appellant missed, is that by a course of dealing in accepting rent after the due date appellant waived strict performance of the lease in that respect.

As has previously been shown, the Court decree, as given, will allow appellant to save the property from tax sale if he cares to do so. It is apparent that the trial Court never meant to imply that the Probate Court was a Court of equity. We will later discuss the power of the guardian to lease and of the Court to approve leases.

We have already discussed the contention that Campbell was incompetent and that he was overreached or over-persuaded.

As we have already shown, the lease in question was not confiscatorial, at least not as interpreted by the trial Court. We marvel at the agility of appellant in continually claiming that the lease was confiscatorial, inequitable, and unconscionable. The undisputed evidence is that Campbell received less than $15 per

month for the place over a period of more than ten years. He was receiving only $10 per month immediately prior to the lease to appellee. The old buildings on the property were of slight if any value. Defendant obligated itself by the lease to pay $45 per month rental, four and one-half times the rent then charged, and in addition to build a building to cost at least $15,000 which would revert to the estate. Appellee actually spent nearly $40,000, and the buildings constructed by appellee, taken by themselves, could probably not have been replaced at the time of the trial for $60,000, according to the testimony of appellant's witness, Backman. According to undisputed testimony, that type building completely depreciates in from fifty to sixty years. The building had been standing nine years at the time of trial but was worth $60,000 then. Assuming its life at forty-nine years, for convenience in figuring, it had a remaining life of forty years at the trial date and would depreciate at the rate of $1500 per year or would be worth $51,000 at the end of the lease. That would amount to $3,400 in additional rent each year over the fifteen-year lease, or including the cash rent, would amount to almost $4,000 per year. We would say that is pretty fair ground rent for a vacant lot worth $1,500 at the time the lease was made and worth possibly $20,000 at the time of trial. Appellant's contention that the rent paid by appellee is nominal is not supported by any evidence at all.

Appellant's Statement of Point No. 9 alleges error in not finding that the property is *in custodia legis*. Ap-

pellee has no quarrel with that statement as a general proposition, but contends it is immaterial here. The Court more than did equity for appellant in requiring appellee to pay taxes on the building, as previously mentioned. There is no evidence in the record which would justify an equity Court in going any farther in favor of the ward than the trial Court went.

In answer to appellant's argument as to his Point No. 10, we have this to say:

We have already shown that the lease was extremely favorable to the ward, both at the time it was made and since that time. The lease under the evidence was not unconscionable. Granted that the Court may relieve a party from a hard bargain in a proper case, this is not such a case.

There is not a shred of evidence that the text of the lease in question is the work of appellee, as claimed by appellant. The record shows that the lease was drawn solely by appellant, as attorney for Campbell. Appellee did furnish a draft of the first lease, but a comparison of such draft with both leases will show that the draft was only a starting place as to the first lease and not used at all as to the second.

While the cash rental is less than taxes presently charged against land and buildings, as has been shown, there was never any attempt made by defendant to force a tax sale. Under the decree entered by the trial Court, cash rent should easily pay the taxes on the land for the balance of the lease.

There is no evidence to support appellant's claim that reasonable rent for the property exceeds all investment, and it would be immaterial even if it were shown. Appellant has shown no equity which would justify cancelling the lease and has failed to show that the lease was anything except an excellent bargain for the ward. The entire estate of the ward in 1941 was valued at $1,500. The same estate nine years later, at the time of trial, was worth $80,000. Sixteen thousand eight hundred dollars ($16,800) of the increase was represented by increase in the value of the land. Appellee claims no credit for that except as its building enhanced the value of the land itself, but the balance of such increase is represented by the building appellee built.

Appellant ever since this suit was commenced has claimed that appellee under the lease was entitled to build only one building and thus by building another building enhanced the taxes. Appellee has contended there was no limit in the lease on its right to build as long as it expended at least $15,000, and that anyway it had constructed only one new building. However, in view of the ruling of the trial Court, that point became moot. The more buildings appellee builds, the more taxes it must pay and the more the appellant will have at the end of the term. Appellant should not object to that.

Contrary to appellant's contention, it would be highly inequitable under all the circumstances to cancel the lease.

Appellee has previously answered appellant's argument as to his Point No. 11.

In answer to appellant's argument on his Point No. 12, appellee finds nothing in that point which would justify a reversal or alteration of the decree made by the lower Court. Admitting that the Probate Court is an inferior Court, it seems that appellant, in order to invoke the doctrine of *caveat emptor,* would have to show that the action of the Probate Court was void. He has not done so. We will further discuss this point under our answer to appellant's Point No. 16.

In support of his Point No. 15, appellant speaks about "the many, many failures of defendant to pay rent." Actually, as the record shows, all payments of rent were made. Over a period of eight years, ten rental payments were made late. Three of these were one day late, three were three days late, one was seven days late, one was fifteen days late, one was seventeen days late, and one eighteen days late. During that same period at least thirty payments were made early. All late payments were accepted by the appellant except the last one. As to that payment, appellant sought in this action to void the lease.

It is admitted that rental payment for the month of December, 1948, was made late. It was sent on December 28, and defendant mailed the January, 1949, rent under date of January 3, 1949. Both checks were refused and returned by appellant's attorney. Appellee then paid the rent, with interest and costs, into Court, and performed the other covenants or agree-

ments on the part of the lessee according to Alaskan law.

> "When in case of a lease of real property and the failure of tenant to pay rent, the landlord has a subsisting right to reenter for such a failure, and may bring action to recover the possession of such property, and such action is equivalent to a demand of the rent and a reentry upon the property. But if at any time before judgment in such action the lessee or his successor in interest as to the whole or a part of the property pay to the plaintiff or bring into court the amount of rent then in arrear, with interest, and the costs of the action, and perform the other covenants or agreements on the part of the lessee, he shall be entitled to continue in the possession according to the terms of the lease."
>
> A.C.L.A. 1949, 56-1-13, page 1927.

Defendant was entitled to continue in possession according to the terms of the lease.

In addition to the statutory provision, the trial Court as a Court of equity, denied the forfeiture claimed by appellant.

> "Equitable relief against forfeiture of a lease is generally granted in all cases of nonpayment of rent if such payment is delinquently made or tendered, unless there is some ground for denying such relief."
>
> 32 *Am. Jur., Landlord & Tenant,* Sec. 891, page 755.

See also,

> *Moran v. Lavell,* 32 R.I. 338, 79 At. 818 on necessity of demand.

Both by reason of statute and by Court action, appellant is denied a forfeiture of the lease based on the late rent payment.

Appellant has argued his statements 16, 17, and 21 together. In short, appellant argued under these points that the subject lease was beyond the authority of the guardian to make or of the Probate Court to approve, that there is no statute authorizing a lease for such a long term and that accordingly the lease is void and that the trial Court erred in not so holding.

At the outset appellee will concede that no statute of Alaska specifically authorizes a guardian to lease the ward's property for a term of fifteen years. In fact there is no statute specifically authorizing a lease of such property for any number of years. Neither is there any statute of Alaska denying to a guardian the right to lease property of his ward for fifteen years or for any other time.

At common law a guardian had inherent power to lease his ward's land without any order or authority from the Court at all. Such leases, made without authority of the Court, were held to be voidable at the election of the ward on the termination of the guardianship. On the other hand, at common law and under Statutes declaratory thereof, a lease by a guardian with Court approval was binding for its full term even in case of prior termination of the guardianship.

> "In the absence of any statutory provision on the subject, it seems that a guardian may lease his ward's real property without obtaining an order of court therefor, though such lease is perhaps more properly made under the supervision

of the court, to the end that a fair rental may be obtained and provisions embraced in the lease for the protection of the ward's interests."

Bancroft's Probate Practice, Sec. 1340, p. 2165.

"Under the common law and statutes declaratory thereof, a guardian has power to lease the lands of his ward without authorization by the probate court."

Bancroft's Probate Practice, Sec. 1341, p. 2167.

"As a rule a lease may be made upon such terms and conditions, and for such length of time, as the court, in the exercise of a sound discretion, may direct or approve as being for the best interests of the ward under the circumstances; the court is authorized, on the application of the guardian, to make such orders and give such directions as are needful and as the circumstances may require."

"Under the law, or statutes simply declaratory thereof, leases made by the guardians to extend beyond the term of the guardianship are voidable; but a lease of a minor's land pursuant to an order of the probate court is valid at common law though it extends beyond minority."

Bancroft's Probate Practice, Sec. 1344, p. 2172.

"It generally has been held in the United States, in the absence of a statute requiring an application to be made for leave to lease, that the power is vested in a general guardian to lease the real estate of his ward on fair and reasonable terms, without seeking the consent or approval of the court."

25 *Am. Jur.,* Sec. 112, p. 72.

"While there is a conflict of authority on the point, the majority of the cases take the view that a court having jurisdiction over estates of infants and incompetents, unless prohibited from so doing by the statute, may, in the exercise of its inherent or statutory power to sell or mortgage land of an infant, properly exercise the lesser power of approving a lease of such land extending beyond the infant ward's minority, if, thereby, his interests are materially promoted, and that such leases made by guardians with the express approval of the court are valid and binding upon the ward after he reaches full age."

25 *Am. Jur.*, Sec. 115, p. 73.

Pertinent Alaskan statutes on this point are as follows:

"The judicial power in the territory of Alaska is vested in a district court, in commissioners exercising the powers of probate courts, and in commissioners as ex-officio justices of the peace."

A.C.L.A. 1949, 52-1-1, p. 1642.

"The respective judges of the court shall appoint, and at pleasure remove, clerks and commissioners in and for the Territory, who shall have the jurisdiction conferred by law in any part thereof."

A.C.L.A. 1949, 54-4-1, p. 1663.

"The commissioners shall be ex officio justices of the peace, recorders, and probate judges."

A.C.L.A. 1949, 54-4-3, p. 1664.

"The commissioners appointed in pursuance of this act and other laws of the United States have

jurisdiction within their respective precincts, subject to the supervision of the district judge, in all testamentary and probate matters; that is—

"* * * Seventh. To take the care and custody of the person and estate of a lunatic or habitual drunkard and to appoint and remove guardians therefor; to direct and control the conduct of such guardians and to settle their accounts."

A.C.L.A. 1949, 61-1-1, p. 2100.

"In the exercise of the jurisdiction conferred upon commissioners by this code in the administration of the estates of deceased persons, and of minors, lunatics, and habitual drunkards, such commissioners shall sit as a probate court, which shall be always open for the transaction of business."

A.C.L.A. 1949, 61-1-2, p. 2102.

"The mode of proceeding is in the nature of a suit in equity as distinguished from an action at law. The proceedings are in writing, and are had upon the application of a party or the order of the court."

A.C.L.A. 1949, 61-1-5, p. 2102.

"Commissioners in their respective precincts shall have power to appoint guardians to take care, custody, *and management of the estate, real and personal, of all insane persons,* idiots, and all who are incapable of conducting their own affairs, and the maintenance of their families and the education of their children." (Emphasis supplied.)

A.C.L.A. 1949, 62-1-11, p. 2174.

"Every guardian so appointed for an insane person shall have the care and custody of the person of the ward *and the management of all his estate* * * *" (Emphasis supplied.)

A.C.L.A. 1949, 62-1-13, p. 2175.

"The guardian shall *also manage the estate* of his ward frugally and without waste, and *apply the income and profits thereof,* so far as may be necessary, for the comfortable and suitable maintenance and support of the ward and his family, if there be any; and if the income and profits be insufficient for that purpose, the guardian may sell the real estate, upon obtaining a license therefor as provided by law, and shall apply the proceeds of such sale, so far as may be necessary, for the maintenance and support of the ward and his family." (Emphasis supplied.)

A.C.L.A. 1949, 62-2-2, p. 2179.

"When the income of the estate of any person under guardianship, whether as a minor, insane person, or spendthrift, shall be insufficient to maintain the ward and his family, his guardian may sell his real estate for that purpose, upon obtaining a license therefor and proceeding therein in the manner hereinafter provided."

A.C.L.A. 1949, 62-3-1, p. 2183.

"When it shall appear upon the representation of any such guardian that it would be for the benefit of his ward that his real estate, or any part thereof, should be sold, and the proceeds thereof be put out on interest or invested in some

> productive stock, his guardian may sell the same accordingly, upon obtaining a license therefor and proceeding therein as hereinafter provided."
>
> *A.C.L.A.* 1949, 62-3-2, p. 2183.

As will be seen from the quotations above made, the Probate Court in Alaska, while not an equity Court as such, is the Court of original and general jurisdiction in probate matters, including supervision over guardians of incompetent persons. The guardian is not only authorized but is directed to "manage" and to control the estate of his ward under supervision of the Court. The statute contemplates that the property of the ward is to receive income and that in turn presupposes that the property will be rented or leased to the best advantage of the estate.

In this case appellant concedes that the property could be leased for some period of time but claims that there is no authority "authorizing the making of a lease for a long period of time on the property belonging to an insane ward" (brief 77).

It is not contended by appellee that the guardian held title to the property. It is contended that it was the duty of the guardian to manage the estate of his ward to the best advantage of the estate. Under all the facts and circumstances it was and is highly advantageous to such estate that a long-term lease be made in exchange for the construction to be carried out by appellee.

> "Under law that conservators 'shall have the charge of' and 'shall manage' the estates of their

wards, such conservators have power, by virtue of their appointment, and without first obtaining authority from the Court of Probate, to lease the premises of their wards for what in view of all the circumstances is a reasonable time."

Palmer v. Chesbro, 55 Conn. 114, 10 Atlantic 508;

Bates v. Dunham, 58 Iowa 308, 12 N.W. 309;

Cypress Creek Coal Co. v. Booneville Mining Co., 194 Ind. 187, 142 N.E. 645;

Martin v. Smith, 214 Minn. 9, 7 N.W. (2d) 481;

Ricardi v. Garbory, 115 Tenn. 484, 89 S.W. 98.

We find nothing in the record or in appellant's brief which would require reversal of the trial Court's finding that the lease as made was, and is, valid and binding.

In argument of his points Nos. 18, 19, and 20, appellant again asserts that the rent and reasonable use of the property far exceeds the expenditures of appellee on the property. We have already answered that contention briefly. Suffice it to say here that at the trial appellant was specifically invited to give his idea of rental value of the lot alone as distinguished from the lot and building, and he wouldn't hazard an opinion (R 445). The only evidence as to rental values was as to an adjoining building and as to this lot as improved by the building constructed by appellee. As to the first, there is no showing that the properties were comparable. In fact, as we have shown, according to the undisputed evidence in the record the building formerly on the lot in question in 1941 was

dilapidated and in such poor shape the City of Anchorage wouldn't allow its repair. As to the second, surely applicant cannot in one breath contend that the building now on the premises is not his until the expiration of the lease, and in the next claim that the rental value and income from that building should be used in determining the rental value of the property. Probably the best way to get at that matter, if it is important, is to take the value of the real property over the years as it appears from the record and apply the rental formula of fifteen per cent of value as testified by appellant's witness, Mr. Bachman. If we do that, we get the following results:

Year	Value of Land (According to Tax Assessments)	Rental Value (At 15% Value of Land)
1941	$ 1500	$ 225.00
1942	2000	300.00
1943	2500	375.00
1944	3000	450.00
1945	3500	525.00
1946	3500	525.00
1947	18,000	2700.00
1948	18,000	2700.00
		$7800.00

During the same period defendant had expended over $38,000 in improving the property and had paid $4320 to appellant in rent.

In conclusion, appellee believes that the record shows conclusively that there is ample evidence to sustain the findings and conclusions and decree of the trial Court.

We believe that appellant long ago should have arranged a sale of the property to maintain his ward and invested the balance so that his ward could have been maintained in cheerful, happy surroundings instead of in a public asylum. Appellant believed it was his duty to keep the property intact for the benefit of the heirs of the ward when he shall have died. We believe the record is conclusive that the guardian had sufficient funds to pay the 1948 taxes when due and thus avoid penalty and interest. He did not see fit to do so. We believe from the record that the guardian, if he had wished to do so, could have secured a modification or at least a postponement of the effective date of the order requiring payment to the United States. We believe that in any event since such order does not create a lien, whereas the taxes were a specific lien against the property, that if necessary to defer one or the other, the payment of the money due the government should have been deferred. All these matters are in the discretion of the guardian and his action on them is his business. However, we feel that it is not fair that the guardian should attempt to cancel the lease and take over defendant's improvements under the facts and circumstances here existing.

Appellant repeatedly has alleged that the lease is unjust, inequitable, oppressive, and confiscatorial, and that appellee has by its inequitable conduct attempted to force a sale of the property so it could be purchased at less than its value. We submit there is no evidence at all to support any of those contentions. We believe there is ample evidence in the record to support the

findings and the conclusions of the trial Court and that appellant has no just cause to complain of the decree entered by the trial Court. We believe the decree of the trial Court should be affirmed.

Dated, Anchorage, Alaska,
January 29, 1951.

Respectfully submitted,
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